



IN THE
Supreme Court of the United States

October Term, 1983

WYNN OIL COMPANY,

Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,
Respondent.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW MEXICO AND
THE COURT OF APPEALS OF NEW MEXICO**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

A. Preliminary Statement

This is the second time that Wynn Oil Company ("Wynn Oil") has petitioned this Court for a writ of certiorari in this collection case. This Court denied Wynn Oil's first petition in *Wynn Oil Co. v. Southern Union Exploration Co.*, 455 U.S. 920 (1982).

Following the denial by this Court of Wynn Oil's first petition, the trial court in New Mexico entered Judgment on the Mandate on April 27, 1982 in favor of Southern Union

Exploration Company of Texas ("SXT")¹ against Wynn Oil and Wynn Exploration Company, Inc. ("Wynn X"). Wynn Oil then appealed the Judgment on the Mandate to the New Mexico Court of Appeals. On March 10, 1983, the New Mexico Court of Appeals affirmed the Judgment on the Mandate. Wynn Oil then petitioned for certiorari to the New Mexico Supreme Court. On April 22, 1983, the New Mexico Supreme Court denied Wynn Oil's petition for certiorari. On May 12, 1983, the New Mexico Supreme Court denied Wynn Oil's Motion for Rehearing of the denial of the petition for certiorari. Wynn Oil's second petition for certiorari to this Court was filed August 9, 1983.

The argument advanced by Wynn Oil in its second petition for certiorari to this Court is the same meritless argument that Wynn Oil has been making to the New Mexico trial and appellate courts and to this Court ever since the New Mexico Court of Appeals first upheld the judgment of liability against it on January 13, 1981. On nine separate occasions, in rulings on motions, appeals and petitions for certiorari, the courts have found that Wynn Oil's position has no merit. On the occasion of Wynn Oil's latest appeal from the Judgment on the Mandate, the New Mexico Court of Appeals finally assessed damages against Wynn Oil for a frivolous, bad faith appeal. The Court of Appeals said:

¹ SXT was originally incorporated in the state of Delaware under the name Southern Union Supply Company. In 1978 the name was changed to Southern Union Exploration Company, and in January of 1981 to Southern Union Exploration Company of Texas. SXT is a wholly owned subsidiary of Southern Union Company. Other wholly owned subsidiaries of Southern Union Company are: Southern Union Gathering Company, Southern Union Exploration Company (formerly Southern Union Properties, Inc.), Southern Union Realty Company, Southern Union Refining Company, Southern Union Financial Corporation and Western Gas Interstate Company.

SX asks that damages be awarded under §39-3-27, N.M.S.A. 1978 on the grounds that Wynn Oil's appeal is frivolous, not in good faith and merely for the purposes of delay. We find this request to be meritorious, and award SX damages of \$1,000.00.

Court of Appeals Opinion, March 10, 1983, Wynn Oil second petition, pp. 3a-4a.

The New Mexico Supreme Court declined to disturb the imposition of damages for the frivolous, bad faith appeal although requested to do so in Wynn Oil's subsequent petition for certiorari.

Because of the interest rate legally applicable to the judgment in this case, Wynn Oil has embarked on a campaign to prolong this litigation as long as possible. By contract, and under the New Mexico statutes, the interest rate applicable to SXT's judgment is limited to 10% per annum. See §56-8-3 N.M.S.A. 1978. Since the entry of the original judgment on May 11, 1979, interest on commercial loans has been well above 10% per annum and has exceeded 20% per annum at times. It is obviously to Wynn Oil's advantage to delay conclusion of this case as long as possible.

Wynn Oil's basic argument, that it had no notice it was being sued for breach of contract, can be asserted only by ignoring the pleadings, discovery and the issues tried in this case. The New Mexico Court of Appeals rejected Wynn Oil's notice argument as "frivolous" the first time it was made. Wynn Oil was expressly sued for breach of contract and was found liable. Wynn Oil refuses to see the obvious and attacks the New Mexico courts as inexperienced, incompetent and lacking in proper judicial temperament. Wynn Oil's *ad hominem* attack on the New Mexico courts is both unpersuasive and unseemly.

Wynn Oil's second petition for certiorari to this Court is virtually identical to its first petition for certiorari. (See Wynn

Oil's Petition for Certiorari, United States Supreme Court No. 81-971, filed November 23, 1981.) In fact, many paragraphs are lifted *verbatim* from the first petition for certiorari. Necessarily, this response will contain some repetition from SXT's response to Wynn Oil's first petition for certiorari. Wynn Oil's present petition continues to be frivolous and should be summarily denied.

B. Factual Summary

This is a collection case stemming from breach of a written contract. In general terms, the written agreements between the parties provided that SXT, as operator, and Wynn Oil and Wynn X would participate in the drilling and development of certain oil and gas property in Lea County, New Mexico, known as the Gallagher Prospect.

By letter dated September 8, 1975, (SXT Ex. 1)² Wynn Oil and SXT agreed to participate in the project. The September 8, 1975 letter did not limit Wynn Oil's participation to one well but referenced all of the property involved in the Gallagher Prospect and SXT and Wynn Oil joined without limitation "in this undertaking." The first two wells were to be drilled without further consent of Wynn Oil. Wynn Oil and SXT signed a written operating agreement dated September 15, 1975. (SXT Ex. 3) Under the initial documents, Wynn Oil had a 75% interest in the project and SXT had a 25% interest in the project.

After the initial documents were signed, a third document dated November 18, 1975 was signed by Wynn X and SXT. (SXT Ex. 4) The November 18, 1975 document evidenced the transfer of the transaction from Wynn Oil to Wynn X

² References to the Record Proper not included in the Appendices are cited as "R." with page numbers. References to the trial transcript below are cited as "T." with page numbers. References to trial exhibits below are cited as SXT Ex. with exhibit numbers.

but Wynn Oil was not released as a contracting party. (Finding of Fact No. 5, R. 3639) Also, the third document reduced the interest of the Wynn companies to 50%. In substance, the November 18, 1975 letter agreement made Wynn X an additional obligor on the Gallagher Prospect for 50% of the costs and expenses of the project. By that document the property and any profits to be realized from the venture were placed in Wynn X; however, Wynn Oil was not released from its obligation to pay 50% of the costs and expenses regarding the Gallagher Prospect. After the transfer of the transaction to Wynn X, it was the intent of the parties that Wynn Oil continue to be obligated on wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258) Wynn X was added as a party to the transaction because of tax, accounting and divorce settlement considerations according to R. C. Wynn, the sole stockholder, director and president of both Wynn Oil and Wynn X (T. 817, 821, 823, 841).

SXT commenced drilling the Gallagher Prospect in late 1975. SXT began billing the Wynn corporations for their initial share of the drilling expenses in February, 1976. Contrary to Wynn Oil's contentions, payment demands and other contract documents were sent to and replied to by Wynn Oil as well as Wynn X. (SXT Ex. 66, SXT Ex. 117, T. 3389) Although bills were due 15 days after receipt, the Wynn corporations refused to pay any billings sent by SXT. (T. 866) The Wynn corporations initially refused to pay the bills because of alleged discrepancies (R. 1467) but also withheld payment of admittedly just bills to gain bargaining leverage in their dealings with SXT. (T. 2921-22) The ultimate amount which the Wynn corporations refused to pay was in excess of \$1.7 million. By their refusal to pay, the Wynn corporations placed the entire burden and risk of the project on SXT. (T. 3389-90) The trial court ultimately found that the Wynn corporations' actions constituted "apparent wilful delay in the acknowledgement of a

legitimate debt passed [sic] due." (Trial court decision letter, March 19, 1979, Wynn Oil second petition at 45 a).

C. Legal Proceedings

When it became apparent that the Wynn defendants intended "to ride" SXT (R. 3390), SXT filed suit against the Wynn corporations. In SXT's original complaint, filed June 26, 1976, SXT named Wynn Oil as a party defendant (R. 1), alleged that SXT and Wynn Oil entered into the September 8, 1975 letter agreement regarding exploration and development of the Gallagher Prospect (R. 2) and alleged that SXT and Wynn Oil entered into the September 15, 1975 operating agreement to develop the Gallagher Prospect. (R. 2-3) The original complaint further alleged that on November 18, 1975, there was a transfer of the Gallagher Prospect asset from Wynn Oil to Wynn X. (R. 3) However, SXT made it clear that it considered Wynn Oil to be liable on the contract when it expressly alleged that both Wynn Oil and Wynn X had breached the written agreement (R. 3-4) and prayed for judgment against both Wynn Oil and Wynn X for breach of the written contract as well as relief under other causes of action. (R. 6-7)

SXT's pattern of pleading against Wynn Oil described above was maintained throughout three amendments to the complaint. (R. 60, 158, 1810) In each amended complaint, Wynn Oil was identified as a party defendant, a party to the contract, alleged to be in breach of contract and judgment was prayed for against Wynn Oil as well as Wynn X on all causes of action.

Moreover, as required by Rule 9(k) of the New Mexico Rules of Civil Procedure, SXT attached the written documents upon which SXT's claim for breach of contract was based to the original complaint and to each amendment. These written documents clearly identified Wynn Oil as a contracting party. In addition, the exhibits identified that a transfer of the asset had been made from Wynn Oil to Wynn X. However, the

pleadings reflect that SXT did not treat the transfer of the asset as a release of Wynn Oil because SXT consistently sought judgment against Wynn Oil for breach of contract. Accordingly, Wynn Oil was on notice at all times from the filing of the initial complaint that it was being sued for breach of contract.

The foregoing completely refutes Wynn Oil's claim in its present petition that SXT's only theory against Wynn Oil was *alter ego*. Interestingly, Wynn Oil admitted at page 7 in its first petition for certiorari to this Court that SXT proceeded against Wynn Oil on a breach of contract theory in addition to its *alter ego* theory. Wynn Oil stated:

Southern Union asserted that Wynn Oil should be liable along with Wynn Exploration because both corporations were allegedly the alter egos of R. C. Wynn. *Southern Union did plead that if "Wynn Oil is not the alter ego of R. C. Wynn, then alternatively, Wynn Oil is directly liable for the damages set forth herein" but alleged no basis for said liability.*³ (Emphasis added)

Wynn Oil first petition for certiorari at p. 7.

Wynn Oil apparently realized that this admission in its first petition completely undercut its present lack of notice argument. Wynn Oil's reaction to this problem was simply to drop any mention of SXT's alternative breach of contract theory in its present petition. See Wynn Oil's second petition for certiorari at p. 5. Contrary to Wynn Oil's second petition, pp. 5-6, SXT tried the case against Wynn Oil on the theory pleaded, that is, breach of contract by Wynn Oil. SXT's theory asserted that Wynn Oil had become obligated to SXT by virtue of the initial contract documents and that Wynn Oil was not

³ Wynn Oil is incorrect in stating that SXT alleged no basis for liability for damages directly from Wynn Oil. SXT alleged that Wynn Oil breached the written contract and that it was liable to SXT directly for that breach of contract in addition to the allegations relating to *alter ego*.

released by the November 18, 1975 letter agreement by which Wynn X was added as a party to the transaction. Again, contrary to Wynn Oil's second petition, pp. 5-6, SXT's trial brief reiterated the breach of contract argument and asked for judgment against Wynn Oil as well as Wynn X for breach of contract. (R. 3543-44)

Wynn Oil obviously had notice of SXT's breach of contract claim against it because in the pleading, discovery and trial stages of this case, Wynn Oil raised a specific defense to the breach of contract count. Wynn Oil's original defense was that Wynn Oil had never signed *any* contracts with SXT regarding the Gallagher Prospect. Wynn Oil maintained that the transaction was always intended to be in Wynn X and that SXT had mistakenly prepared, and Wynn Oil had mistakenly signed, the initial contract documents.⁴

By letter dated March 19, 1979 the court advised the parties of its decision in which it found in favor of SXT on its complaint against both Wynn corporations. The trial court further rejected all of Wynn X's counter-claims. (R. 3545) The trial court entered detailed findings of fact and conclusions of law which rejected Wynn Oil's theory that Wynn Oil was not liable to SXT because Wynn Oil plainly appeared as a signatory to the initial contract documents. (R. 3638, Finding No. 4) The trial court further found that the third document did not release Wynn Oil from its contract obligations. (R. 3639, Finding No. 5) The trial court's decision was that both Wynn corporations, Wynn Oil and Wynn X, were in breach of contract.

⁴ It is true that Wynn X counterclaimed against SXT. (R. 1883) However, contrary to Wynn Oil's second petition, p. 4, the Wynn defendants refused payment prior to any claim against SXT for negligent drilling and development of the property.

On July 3, 1979 a supersedeas bond in the sum of \$1.5 million was posted on behalf of Wynn Oil. Wynn X did not supersede the judgment and SXT's operator's lien against Wynn X's interest in the Gallagher Prospect was foreclosed. On May 4, 1982, after entry of the Judgment on the Mandate, SXT collected \$1.5 million on the supersedeas bond. Until SXT effected this collection on the first Judgment on the Mandate, the Wynn corporations had no investment in the property whatever. There remained a deficiency as of May 4, 1982 of \$668,973.03 for which both Wynn Oil and Wynn X are liable.⁵ The judgment against Wynn Oil and Wynn X bears interest at 10% per annum under New Mexico law. §56-8-3 N.M.S.A. 1978. It has been, and is now, to Wynn Oil's advantage to delay the conclusion of this case as long as possible because of the current higher rates of interest. It is suggested that this second petition is part of a strategy to delay, as long as possible, the conclusion of this case.

D. The First Appeal

In its brief in the New Mexico Court of Appeals on the first appeal, Wynn Oil contended that the basis of its liability in the trial court, that it had undertaken certain obligations by signing the initial contract documents and had never been released therefrom, was neither pleaded nor tried. In response to Wynn Oil's argument that it did not have notice of the basis of liability, the Court of Appeals referred to the extensive

⁵ R. C. Wynn was the president, sole stockholder and director of both Wynn corporations. (T. 817, 821, 823) At the time Wynn X was proposed as a contracting party by R. C. Wynn in November of 1975, Wynn X had no assets of value. (T. 830-831) Wynn X remained a shell throughout this litigation and conducted no business except as a party litigant in this case, financed for that purpose by R. C. Wynn. At the conclusion of the litigation in the trial court, it was obvious that a judgment against Wynn X would never be collectible. The judgment against Wynn Oil is apparently collectible from letters of credit posted by Wynn Oil to supersede the Judgment on the Mandate during this second appeal.

pleading and discovery in this case and termed Wynn Oil's argument "frivolous." (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 16a)

Wynn Oil also argued on the first appeal, as it had in the trial court, that Wynn Oil had not intended to sign *any* contract documents and therefore was not a party to the contract with SXT. Wynn Oil further argued that the trial court's findings that Wynn Oil had executed the contract and became a party thereto were not supported by substantial evidence. Alternatively, Wynn Oil argued for the first time on appeal that if it was held to have signed the initial contract documents, then the November 18, 1975 letter constituted a novation by which Wynn Oil was released from its contract obligations.

With regard to the issue of liability as to Wynn Oil the New Mexico Court of Appeals correctly observed that Wynn Oil did not sign the third document of the contract. (Court of Appeals Opinion, January 11, 1981, Wynn Oil second petition, p. 16a, Wynn Oil second petition, p. 21a) The Court of Appeals, however, held that Wynn Oil became liable to SXT on the basis of the initial contract documents and was never released therefrom. Wynn Oil's argument that the November 18, 1975 letter worked a novation releasing Wynn Oil was also rejected. On this basis, the judgment of liability against both Wynn Oil and Wynn X was upheld. The decision of the New Mexico Court of Appeals was entered January 18, 1981. While the decision remanded the case to the trial court for minor modifications in the judgment, SXT substantially prevailed on the first appeal. Wynn Oil's suggestion that it prevailed on the first appeal is grossly misleading.

E. Proceedings on Remand

The New Mexico Court of Appeals remand instructions on the first appeal appear at the end of the decision. The Court of Appeals stated:

The judgment of liability having been affirmed, the cause is remanded for further proceedings in connection with the amount of the judgment, as previously specified.

Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 30a.

What was "previously specified" by the Court regarding the amount of the judgment? The Court of Appeals directed that three discrete items be corrected in the amount of the judgment:

1. There was a discrepancy of \$34,867.43 for operating costs and delay rental which appeared in the judgment but not the findings. The Court of Appeals directed the trial court to resolve the discrepancy on remand. (Court of Appeals Opinion, January 13, 1981, Wynn Oil's second petition, p. 23a)

2. Credits to the Wynn corporations for sales of oil and gas production were to be credited monthly as received instead of a lump sum on October 31, 1978. (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 24a)

3. The interest on the money owed by the Wynn corporations was to be simple rather than compound. (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, pp. 25a-26a)

Certainly, the Court of Appeals did not specify that Wynn Oil's liability was different from Wynn X's liability. On this point the Court of Appeals stated:

The trial court found Wynn Oil and Wynn X liable for 50 percent of SX's costs and expenses. This percentage amount has not been disputed. The trial court concluded that Wynn Oil and Wynn X, as of November 1, 1978, owed SX \$1,879,791.22 and entered judgment for that amount on May 11, 1979. This is an incorrect sum. (Emphasis added.)

Wynn Oil's second petition at 23a.

Thus, Wynn Oil's argument that the Court of Appeals intended on remand for the trial court to calculate a different basis of liability for Wynn Oil is directly refuted by an express statement in the first opinion of the Court of Appeals.

On remand the trial court made the three minor corrections in the amount of the judgment specified by the Court of Appeals. The trial court did not change its prior ruling that Wynn Oil and Wynn X were each liable for 50% of the costs and expenses of drilling and operating the Gallagher Prospect wells. The Judgment on the Mandate against Wynn Oil and Wynn X, as recalculated, was \$1,714,571.41. (Judgment on the Mandate, Wynn Oil second petition, p. 47a)

The trial court would have violated the mandate of the Court of Appeals if it had found, as Wynn Oil requested, that Wynn Oil was liable for 75% of the cost of the first well only. (\$346,345.41) As noted above, Wynn Oil did not dispute that it was liable for 50% of all well costs on the first appeal, and the Court of Appeals expressly so found.⁶

Wynn Oil also argues in its second petition that it did not consent to the drilling of the last four wells. In doing so, Wynn Oil ignores the evidence that the intent of the parties was that Wynn Oil initially agreed to responsibility for all wells drilled on the Gallagher Prospect (SXT Ex. 1, the September 8, 1975 letter agreement). Wynn Oil also ignores evidence of the intent of the parties that Wynn Oil was obligated on all wells which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258)

On this point the trial court's decision stated:

⁶ Wynn X conceded that it owed 50% of the costs and expenses of all wells. Wynn X's only asset of consequence was its 50% interest in the Gallagher Prospect which was foreclosed in this proceeding. Wynn X is presently judgment proof.

With the exception of the Supco Number One Well upon which the notice was clearly inappropriate under the terms of the original agreement or understanding, I believe that the evidence must weigh on behalf of the plaintiff [SXT] to the extent that Wynn was in fact a willing participant in each of the drilling operations.

Defendant Wynn Companys did pursue the matter and all outward communications reflected continuing participation and interest upon the part of the Wynn defendants.

(Trial court decision letter, Wynn Oil second petition, pp. 41 a-42a)

In effect, Wynn Oil is asking this Court to determine the weight and credibility of the evidence. This effort was rejected by the New Mexico appellate courts and should be rejected here. The substantial evidence rule, which is universally accepted, prohibits the appellate courts from weighing the credibility of the evidence presented at trial. There was clearly sufficient evidence for the trial court to hold Wynn Oil liable for 50% of the costs and expenses of all five wells.

F. The Second Appeal

On April 27, 1982, the trial court entered the Judgment on the Mandate. Wynn Oil appealed from that judgment and, in essence, asked the New Mexico Court of Appeals to decide whether its first opinion meant that Wynn Oil had a different basis of liability than Wynn X; that is, that Wynn Oil was liable for 75% of the costs of the first well only instead of 50% of the costs of all five wells. In a unanimous opinion entered March 10, 1983, the Court of Appeals affirmed the Judgment on the Mandate which held Wynn Oil liable for 50% of the cost of all five wells.

The result was not surprising. The first opinion expressly stated that Wynn Oil and Wynn X were each liable for 50%

of the costs of all five wells. This point was not even disputed by Wynn Oil in the trial or on the first appeal. Moreover, Wynn Oil's argument had previously been rejected by the Court of Appeals in ruling upon Wynn Oil's Motion to Recall Mandate (the first Mandate) filed September 9, 1981. In its Motion to Recall Mandate Wynn Oil specifically sought a statement from the Court of Appeals that Wynn Oil was liable for only 75% of the cost of the first well. Wynn Oil's Motion was summarily denied by the author of the first opinion, Chief Judge Wood, and Judge Lopez, who concurred in the first opinion. Judge Walters, the other concurring judge on the first opinion, also concurred in the second opinion. Thus, all three judges involved in the original unanimous opinion have reviewed and rejected Wynn Oil's suggestion that the first opinion held that Wynn Oil was liable for only 75% of the cost of the first well.

The second opinion also assessed damages of \$1,000.00 against Wynn Oil for a frivolous, bad faith appeal made for purposes of delay. This was a gentle but firm statement to Wynn Oil that the Court of Appeals was tiring of Wynn's campaign to prolong this litigation indefinitely in an effort to avoid payment of a just debt. The damage award was left undisturbed by the New Mexico Supreme Court.

JURISDICTION

This Court Lacks Jurisdiction Because the Petition Presents No Substantial Federal Question

It is settled that the United States Supreme Court will not accept a case on certiorari unless it presents a substantial federal question. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1951); *Zucht v. King*, 260 U.S. 174, 176 (1922).

The present case is not appropriate for review because it is devoid of a substantial federal question. Even Wynn Oil acknowledges that this is a simple contract case between private

parties. (Wynn Oil's second petition, pp. 2-3) Wynn Oil and SXT undertook to participate in a drilling venture in Lea County, New Mexico and were to share in the drilling, development and operating expenses and the profits if any. At about the time drilling commenced, Wynn X, another corporation solely owned and operated by R. C. Wynn, was added as an additional obligor to the transaction, but Wynn Oil was never released from its obligations. The Wynn corporations failed to pay their share of the drilling, development and operating expenses. SXT sued Wynn Oil and Wynn X for breach of contract. No federal question was ever presented in the voluminous pleadings in this case. No federal questions arose in discovery and no federal issues were suggested at trial. Similarly, no federal questions were suggested on appeal until a second motion for rehearing was filed during the first appeal following a denial of certiorari by the New Mexico Supreme Court. This occurred after the first appeal had consumed over two years. On its Second Motion for Rehearing in the New Mexico Supreme Court on the first appeal, Wynn Oil claimed for the first time that it had been deprived of due process and equal protection of the law under the United States Constitution because it did not have "notice" that it was being sued for breach of contract.

Similarly, on its second appeal Wynn Oil made no mention of deprivation of constitutional rights in the New Mexico Court of Appeals. Wynn Oil did not make such claims until it filed its petition for certiorari in the New Mexico Supreme Court thereby raising a "federal question" for the purpose of continuing its campaign prolonging this litigation.

In another contract case between private parties, *Black v. Cutter Laboratories*, 351 U.S. 292 (1955), this Court denied a petition for certiorari on the basis of lack of a substantial federal question. This Court said:

As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented.

351 U.S. at 299.

Like *Black*, the decision of the New Mexico courts involves a determination of the rights and obligations under state law of a contract between private parties. There is no treaty, no federal statute, no federal regulation and no issue of federal law in this case which would suggest that this Court accept this case on certiorari.

ARGUMENT

Reasons for Denying the Writ

Rule 17 of the Rules of the United States Supreme Court provides as follows regarding considerations governing review on certiorari:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The principle embodied in Rule 17 was expanded upon in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1954). In *Rice* the Court said:

In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, *the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.*"

Lane Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.C. 422 (Emphasis supplied.)

349 U.S. at 79.

Based upon a reading of Rule 17 and *Rice*, this case does not present a situation which qualifies for consideration on certiorari by the Supreme Court.

1. The Decision in This Case Does Not Conflict With Any of This Court's Opinions or Any Court's Opinion.

At no place in this second petition does Wynn Oil contend that the decision of the New Mexico courts is in conflict with any opinion of this Court or any other court. In essence, this case presents a state court interpretation of a contract between private parties on facts peculiar to this case. There are no federal issues involved in the contract interpretation and no federal statutes come into play. As such, the decision is not in conflict with any state or federal decisions.

2. The Decision in This Case Affects Only the Litigants Involved and Has No Application Beyond Those Litigants.

Wynn Oil acknowledged in its first petition that this is a case which will affect only Wynn Oil and SXT. (Wynn Oil first petition, p. 14) There is no principle involved here which will have application beyond the parties even if this case were to be accepted for consideration on certiorari. Nothing has happened since the first petition to change the fact that this remains a case which will affect only Wynn Oil and SXT.

3. The Decision Reached by the New Mexico Court is Correct.

Finally, the decisions of the New Mexico trial and appellate courts have not departed from the accepted and usual course

of judicial proceedings. On the contrary, the courts in this case have done justice between the parties. The essence of Wynn Oil's petition is that it did not have either notice or opportunity to defend itself on the basis of liability which was ultimately sustained by the New Mexico courts. The basis of liability found by the trial court and sustained by the appellate courts in New Mexico was simply that Wynn Oil was the signatory to a contract regarding the development of certain oil and gas property in New Mexico. Wynn Oil was never released from its obligations although there was a subsequent document by which another Wynn corporation, Wynn X, was added as an obligor on the contract.

Wynn Oil's claim that it had no notice of this theory of liability is totally unfounded. As indicated earlier, SXT, in its initial complaint, sued Wynn Oil and Wynn X on the contract. It is true that SXT had an alternative theory of recovery, *alter ego*, but from the outset SXT sought to obtain a judgment against Wynn Oil as well as Wynn X for breach of contract. The written agreements were attached to the complaint and the three amendments to the complaint. SXT in its pleadings identified the Wynn Oil-Wynn X transfer but still sought judgment against Wynn Oil for breach of the contract. Therefore, Wynn Oil was clearly on notice that SXT sought to hold Wynn Oil liable for breach of the written contract. Wynn's lack of notice claim is patently frivolous.

The discovery phase of this case took over two years. There are some 4,000 pages of pleadings excluding depositions. Wynn Oil took the deposition of SXT's chief executive officer three times during trial preparation. Had the pleadings been unclear in the least, Wynn Oil certainly had ample opportunity to discover the basis for SXT's claims against Wynn Oil.

At trial, SXT introduced as proof of its claim all of the contract documents and sought judgment for breach of contract against Wynn Oil. Wynn Oil's lack of notice argument is further

flawed by the fact that Wynn Oil presented a defense on this issue at trial. Wynn Oil's defense at trial was that it did not intend to sign *any* of the contracts. R. C. Wynn claimed that it was just a "mistake" that the initial contracts had been signed by himself on behalf of Wynn Oil. The trial court rejected Wynn's testimony and found that Wynn Oil was a signatory to the contract. The trial court entered judgment against Wynn Oil and Wynn X because both were parties to the contracts. Wynn Oil undertook certain obligations and was never released from them.

Wynn Oil's table at pp. 12-13 of its second petition purporting to summarize the documents is inaccurate and misleading and ignores the testimony regarding the documents. The first document committed Wynn Oil to pay 75% of the costs and expenses on the entire Gallagher Prospect and to pay 75% of the costs and expenses of the Gallagher State 8-2 and the Lea-C-State without further election. (P. Ex. 1, T. 144, 255) The second document is the Operating Agreement which put the initial agreement into effect. The third document evidenced the transfer of the transaction from Wynn Oil to Wynn X, added Wynn X as an additional obligor for 50% of the costs and expenses but did not release Wynn Oil from its obligations. SXT has consistently acted in accordance with the contract and sought only 50% of the costs and expenses of all the wells from Wynn Oil and Wynn X. Indeed, Wynn Oil asserted until the first opinion of the New Mexico Court of Appeals that it was liable for nothing, but if it was liable at all, its liability was limited to 50% of the costs and expenses of the wells in which the Wynn corporations elected to participate. If there were some basis for Wynn Oil's present position, it seems that Wynn Oil would have made it known during discovery or trial.

Wynn Oil's table also fails to take cognizance of the testimony that it was the intent and understanding that Wynn Oil was obligated on all wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258)

After Wynn's trial defense failed, Wynn Oil tried a new and different theory on appeal. In the Court of Appeals, Wynn Oil argued that if it had intentionally signed the first two documents, the November 18, 1975 letter constituted a novation as a matter of law thereby releasing Wynn Oil from any obligations with respect to the Gallagher Prospect. Again, Wynn Oil's argument is proof that Wynn Oil had notice of the basis of the judgment against it and raised a defense.

Wynn Oil's table regarding the theory upon which it was held liable at p. 14 of its second petition is also inaccurate. *Alter ego* was not SXT's only theory against Wynn Oil as Wynn Oil admitted in its first petition. While the Court of Appeals found that the third document itself was not an assignment, it did evidence the transfer of the transaction from Wynn Oil to Wynn X and, more importantly, affirmed that Wynn Oil was never released from its obligations to SXT. Wynn Oil ignores the evidence regarding the understanding that Wynn Oil was responsible for wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. The second Court of Appeals opinion affirmed the Judgment on the Mandate by referring to the first opinion as a whole. Wynn Oil finds fault with this approach, and would have the courts focus on one phrase of the first opinion taken totally out of context by Wynn Oil.

Again, the theory of liability upheld in the first decision of the Court of Appeals is the same pleaded by SXT and found by the trial judge. Wynn Oil undertook certain obligations in writing and was never released therefrom. The Court of Appeals affirmed the Judgment on the Mandate. The only issue was whether the Court of Appeals intended by its first opinion to hold Wynn Oil liable for 50% of the costs of all wells. Certainly, the Court of Appeals is the best judge of the intent of its first opinion. Accordingly, the decisions of the New Mexico courts in this case are correct and there is no reason to grant Wynn Oil's second petition for certiorari so that this Court can review issues it has previously declined to review.

CONCLUSION

In sum, Wynn Oil had adequate notice of SXT's claims in this litigation. Wynn Oil defended the claims vigorously, and presented multiple defenses in the trial and appellate courts of New Mexico. The rejection of Wynn Oil's arguments is not a basis for review of this case by this Court, and certainly not on the ground of lack of notice, opportunity to defend or unequal treatment. Rather, Wynn Oil has taken full advantage of the judicial system to avoid payment of a substantial and just debt. Wynn Oil has had its day in court several times now and the time has arrived to terminate this litigation. SXT respectfully requests that Wynn Oil's second petition for writ of certiorari be denied.

Respectfully submitted,

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